No. 92-1696

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JESSE L. COOK,

Petitioner,

v.

CHRYSLER CORPORATION and

UNITED AUTOMOBILE AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS LOCAL 110,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. *HARDISON* HAS NOT SETTLED RELIGIOUS ACCOMMODATION LAW.	2
II. CONTRARY TO CHRYSLER'S ASSERTION, THE DISTRICT COURT'S CONCLUSION OF LAW THAT ALL PROVISIONS OF A LABOR CONTRACT—NOT MERELY ITS SENIORITY PROVISO—ARE INVIOLATE TO A RELIGIOUS ACCOMMODATION CLAIM CLEARLY POISONED THE OUTCOME OF THIS LAWSUIT.	3
III. ALTHOUGH THE EEOC GUIDELINES MAY NORMALLY BE ACCORDED LESS WEIGHT THAN ADMINISTRATIVE REGULATIONS, HERE SIGNIFICANT WEIGHT SHOULD BE ACCORDED THE POST-*HARDISON* GUIDELINES, AND THIS COURT SHOULD DECIDE WHETHER THE GUIDELINES ARE CONSISTENT WITH *HARDISON*.	7
IV. THE OTHER SABBATARIAN AT CHRYSLER WAS ACCOMMODATED AT THE SAME TIME COOK WAS BEING DENIED ACCOMMODATION.	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979) 4

Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) 6

Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973) 7

Cook v. Chrysler Corp., 779 F. Supp. 1016 (E.D. Mo. 1991) 4

Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976) 8

Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80 (7th Cir. 1979) 7

Nottelson v. A.O. Smith Corp., 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981) 6

Trans World Airlines v. Hardison, 432 U.S. 63 (1977) 2,3,8

Statutes and Rules:

42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964, as amended) 2

42 U.S.C. § 2000e(j) 8

EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. §§ 1605.1-1605.3, 45 Fed. Reg. 72615 (1980) 7,8

Miscellaneous:

Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 Brooklyn L. Rev. 598 (1978) 3

Table of Authorities Continued

	Page
Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, U. Ill. L.F. 69 (1977)	7
Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirements Since Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839 (1985)	2,3

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REPLY BRIEF OF PETITIONER

INTRODUCTION

Contrary to Chrysler's assertion, this case is not unique to plaintiff Cook. Chrysler's objection to Cook's request for an accommodation is essentially the same as that raised by all unionized employers.[1] According to Chrysler:

> This case involves the application of the religious accommodation provision of Title VII to the

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[1] Defendant union was joined to permit full relief. The allegations of Title VII violation were directed at the employer Chrysler Corporation.

> highly structured production environment of a unionized employer whose labor agreement covers virtually every aspect of production, scheduling, and employment.

(Chrysler Brf. at 15) If such unionized employers are excused by *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), from Title VII's religious accommodation responsibility, then this Court has effectively nullified the congressional will. Cook believes that *Hardison* was not meant to be a constitutional repealer.

I. *HARDISON* HAS NOT SETTLED RELIGIOUS ACCOMMODATION LAW.

Chrysler's argument that *Hardison* has resolved the issues presented by section 2000e(j) of Title VII and that the courts have uniformly applied that statutory provision is simply incorrect. One commentator has noted that the ambiguity of the "undue hardship" standard "has produced substantial disagreement among the courts regarding the precise degree of hardship attaching to the employer's accommodation obligation under the Act." Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirements Since Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839, 841 (1985). The writer noted that "[t]he disagreement is often explained in both cases and commentary as a function of the varied factual contexts in which the accommodation issue arises . . . ." Although acknowledging that what constitutes reasonableness and undue hardship will vary under the circumstances of each case, the commentator concluded that "[t]he disagreement extends beyond this, . . . because courts do not approach the varied factual contexts with a consistent analytical framework." *Id.* at 841 n.19.

The writer concludes that "[o]f the two principal holdings of *Hardison*, only one has carried a clear message to the circuits: the dominance of seniority over religious ac-

commodation. Therefore, although lower courts may no longer require employers to make involuntary shift assignments or other accommodations that violate seniority practices, they remain free to interpret section 2000e(j)'s undue hardship standard to require an alternative mode of accommodation that does not threaten seniority." *Id.* at 847.

The writer flatly states that "far from resolving the lower courts' confusion as to the meaning of section 2000e(j)'s accommodation requirement, the Supreme Court's language in *Hardison* has been the foundation for highly divergent applications of the statute." *Id.* at 847-48.[2]

II. CONTRARY TO CHRYSLER'S ASSERTION, THE DISTRICT COURT'S CONCLUSION OF LAW THAT ALL PROVISIONS OF A LABOR CONTRACT—NOT MERELY ITS SENIORITY PROVISO—ARE INVIOLATE TO A RELIGIOUS ACCOMMODATION CLAIM CLEARLY POISONED THE OUTCOME OF THIS LAWSUIT.

Chrysler attempts to defeat Cook's petition by claiming that the question of whether provisions of a labor agreement may be utilized by an employer as a shield to ward off an employee's religious accommodation request is irrelevant because the cost of accommodating Cook was more

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[2] One reviewer of *Hardison*, noting that the Supreme Court embarked on a fact-finding mission in deciding *Hardison*, stated that "[i]t is difficult, if not impossible, to cull from the opinion any law which will serve as precedent in other religious discrimination cases. The Court found that TWA had satisfied its affirmative duty to Hardison and little else. Thus, the reasonable accommodation standard, to the extent it existed in the past, was essentially emasculated by the majority opinion since, aside from the judicial mandate which preserves all valid collective bargaining agreements for the future, the decision is clearly limited to its particular facts." Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 Brooklyn L. Rev. 598, 620 (1978).

than *de minimis*. However, the trial court spoke not in the conjunctive (as Chrysler would have this Court believe) but rather in the disjunctive. The court did not list "[t]he other options that plaintiff . . . [claimed] should have been considered." *Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1023 (E.D. Mo. 1991); *see* p. 22a.[3] But instead, the court summarily disposed of those accommodation options as being *either* "violative of the collective bargaining agreement *or* [not and] would have caused undue hardship to Chrysler." *Id.* (emphasis supplied).

The district court based its "more than *de minimis* cost" finding specifically on only one of the available means of accommodation—that is excusing Cook from work for his full shift on Friday, thus resulting in a short workweek but still providing the full benefit package. The trial court quantified "[t]he costs of the benefit package lost because of [Cook] being absent 20% of the time at $1578 per year." *Id.* at 1021; *see* p. 16a.

The trial court also concluded that Chrysler was not able to accommodate Cook because of "Cook's seniority (or lack thereof) *and* the collective agreements." *Id.* at 1025; *see* p. 25a (emphasis supplied). Neither the court's holding about seniority nor about the collective bargaining agreements was based upon the extent of the cost of such an accommodation. Instead, the trial court concluded that the "maze of restrictions" contained in the labor agreements created a " 'violation wall.' " *Id.* at 1024; *see* p. 24 a.[4]

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[3] Reference to "____a" refers to the appendix to the Petition for Writ of Certiorari.

[4] Chrysler maintains that no accommodation can be provided for religious reasons when the identical accommodation is not made available for all other employees for secular concerns. (*See* Chrysler Brf. at 20.) The Eighth Circuit earlier in *Brown v. General Motors Corp.*, 601 F.2d 956, 962 (8th Cir. 1979), rejected this very argument stating that such an argument "[c]arried to its logical conclusion . . . would preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)."

Chrysler argues that "[e]xcusing Cook every Friday night . . . would violate the labor agreement, which calls for the discharge of an employee who is absent 20% or more of the time, whether excused or unexcused." (Chrysler Brf. at 17) There are several problems with this contention. Nothing in the chronic absentee procedure mandates termination. But assuming termination may result if the individual is absent from work 20% or more of the time, at no time would Cook be absent 20% of the time during the regular workweek as a result of missing work on Friday night. He would have to be absent every Friday during the year to fall under the condemnation of the chronic absentee program. Chrysler forgets that a number of Fridays are designated as holidays when the plant is closed. This is evidenced by the designated holidays in the collective bargaining agreement. (A 74) For instance, from November 29, 1985, to November 29, 1986, five holidays fell on Friday: November 29, 1985, March 28, 1986, July 4, 1986, and November 28, 1986. From November 29, 1986, to November 29, 1987, five holidays fell on Friday: December 26, 1986, January 2, 1987, April 17, 1987, July 3, 1987, and November 27, 1987. Cook and the rest of the factory also would not be scheduled to work 2 or 3 additional Fridays each year during the plant shut down at the time of the model change. (A 560)

Cook and the union suggested that plaintiff utilize his paid absence allowances ("PAAs") for a portion of his Friday night absences since each employee is entitled to take PAAs in segments as low as four hours at a time. It is conceivable that if Cook had been permitted to work until sundown on Friday, as Chrysler had for years permitted another Sabbatarian to do, ten of the remaining Friday night absences would have been excused.

Cook was willing to use his vacation time on Fridays, one day at a time. Management rejected this proposal claiming Chrysler does not permit employees to take partial weeks of vacation. (A 1069-72) According to Chrysler,

such an arrangement was not provided for in the collective bargaining agreement. (A 1075) But Chrysler management admitted that they had no idea whether the union would have agreed to a one day at a time vacation proposal. (A 1073-74)

Cook also came into work after sundown on Saturdays. He was willing to do this in the future at straight time to complete a 40 hour workweek. Thus, the district court's finding that the available accommodation would result in the payment of full benefits for less than a 5 day workweek is not supported by the record.

Another alternative would have completely eliminated Chrysler's so-called benefit hardship. Chrysler attempted to quantify the benefit package by spreading it over a five-day workweek. If Chrysler was able to quantify the portion of the benefit package that it felt Cook was not entitled to as a defense in this trial, it was equally able to come up with the figure prior to his discharge and do one of three things: 1) reduce Cook's pay accordingly; 2) require Cook to pay back the additional sum; or 3) make a pro rata reduction in Cook's benefits. But it is questionable that these alternatives were necessary in light of the other available accommodation alternatives.

An accommodation somewhat similar to this has been validated in the union dues cases where the employee, seeking on religious grounds to avoid the payment of union dues, has agreed to pay an equivalent sum to a non-religious, non-union charitable organization in lieu of the payment of union dues. Such an arrangement, though inconsistent with the collective bargaining agreement, has been validated by numerous courts of appeal as an appropriate means of providing a religious accommodation. *See Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), and *Nottelson v. A. O. Smith Corp.*, 643 F.2d 445, 451 (7th Cir. 1981).

III. ALTHOUGH THE EEOC GUIDELINES MAY NORMALLY BE ACCORDED LESS WEIGHT THAN ADMINISTRATIVE REGULATIONS, HERE SIGNIFICANT WEIGHT SHOULD BE ACCORDED THE POST-*HARDISON* GUIDELINES, AND THIS COURT SHOULD DECIDE WHETHER THE GUIDELINES ARE CONSISTENT WITH *HARDISON*.

Chrysler argues that the EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1, 1605.3, "cannot be squared with *Hardison*." (Chrysler Brf. at 25) Chrysler argues, contrary to the specific wording of the Guidelines, that no showing need be made as to the magnitude of the hardship or the relative cost to the employer.

Logic, however, is on the side of the EEOC Guidelines. Judge Pell of the Seventh Circuit, quoting Professor Kenneth P. Lopatka, stated:

> The major factors which enter into the decision of whether the hardship involved is "undue" are the size of the work force, *the type of shift scheduling involved in the employer's operation*, the skilled status of the religious employee, the existence of a pool of qualified replacements, *the risk of impairment in the performance of essential public services*, and the safety considerations involved in the reduced manning of crews or in *requiring employees to work successive shifts to substitute for the religious employee.* (Footnotes omitted.) (Emphasis added as to those matters particularly applicable here.)

Minkus v. Metropolitan Sanitary Dist., 600 F.2d 80, 85 (7th Cir. 1979) (Pell, J., concurring) (emphasis in original), citing Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, U. Ill. L.F. 69, 108 (1977).

As the district court in *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973), pointed out, "[a]s the degree of business hardship increases, the

quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what . . . Chief Justice Burger was referring to as the 'business necessity' which would qualify as a legitimate reason for discharging an employee."

This Court's utilization of the "more than *de minimis* cost" test presupposes a quantification of the undue hardship involved in any accommodation. In fact, without such quantification, the trial court simply cannot properly determine when the cost of an accommodation results in undue hardship. Without quantifying the cost, how can a trial court, for instance, determine whether the cost from "lost efficiency" is more than *de minimis*? How will a reviewing court conclude that the trial court was correct in its finding without quantification?

Chrysler's attack on the EEOC Guidelines ignores one of the prime reasons for the 1972 congressional insertion of the religious accommodation provision in Title VII. As the Fifth Circuit explained in *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F.2d 163, 168 n.9 (5th Cir. 1976), 42 U.S.C. § 2000e(j) was to provide the statutory basis for EEOC to formulate guidelines in the future. Appendix 2, section 1605.2 and 1605.3 of the EEOC Guidelines noted that the Guidelines was adopted after this Court's decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), following hearings and finding that "there is widespread confusion concerning the extent of accommodation under the *Hardison* decision." 45 Fed. Reg. 72615 (1980).

It makes no sense to empower EEOC to issue guidance to employers and employees if no reliance can be placed on that guidance. Further, the resulting confusion can only lead to more litigation. If EEOC guidance as to the meaning of "*de minimis* cost" means nothing and is inconsistent with *Hardison*, there is no better time for employers, em-

ployees, and, yes, EEOC to be told. This Court is the appropriate tribunal to make such a determination.

IV. THE OTHER SABBATARIAN AT CHRYSLER WAS ACCOMMODATED AT THE SAME TIME COOK WAS BEING DENIED ACCOMMODATION.

Counter to Chrysler's assertion, Roger Williams, the other Sabbatarian working concurrently at Chrysler with Cook, did not satisfy his post-May, 1986, Friday night scheduling conflicts only by use of the book procedure. After May 8, 1986, when Williams' paid absence allowances (PAAs) were exhausted, his foreman permitted him to leave work early at sunset without penalizing him. (A 299-300)

During the same time, Cook was told that if he left work early on Friday night he would be treated as a voluntary "quit." (A 449, 610, 614-15) In addition, Williams was assigned the position of a floater because in that position it was easier for management to permit Williams to leave on Friday night. (A 302, 399-400) The same consideration was not given to Cook.

CONCLUSION

For the above-stated reasons and for the reasons stated in plaintiff's Petition, the Petition for Writ of Certiorari should be granted.

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